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No. 15-108

IN THE
Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO,
Petitioner,

v.

LUIS M. SÁNCHEZ VALLE AND
JAIME GÓMEZ VÁZQUEZ,
Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Puerto Rico

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Congress's 1950-1952 enactment of legislation delegating certain powers to Puerto Rican local authorities, but leaving undisturbed Puerto Rico's constitutional status as a "territory," overruled this Court's decision in *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937)?

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INTRODUCTION

For the second time in four years, Petitioner asks this Court to wade into the divisive debate over Puerto Rico's constitutional status in the United States. *See Puerto Rico v. United States*, 132 S. Ct. 2375 (2012) (denying review of petition contending that the Constitution grants Puerto Ricans the right to representation in Congress). The Court should decline the invitation. The question presented is of little practical significance to criminal justice in Puerto Rico, and Petitioner's proclamation of the "political implications" of the decision below, Pet. 1, is a basis for denying certiorari, not granting it.

Petitioner's lead argument for certiorari is that the decision below conflicts with *United States v. Lopez Andino*, 831 F.2d 1164 (1st Cir. 1987). But *Lopez Andino* is a decades-old, barely-reasoned opinion which may no longer be good law in light of the First Circuit's very recent decision in *Franklin California Tax-Free Trust v. Puerto Rico*, No. 15-1218, ___ F.3d ___, 2015 WL 4079422 (1st Cir. July 6, 2015). The Court should defer review until the First Circuit has the opportunity to clarify its precedent and consider the continuing viability of *Lopez Andino*.

Contrary to Petitioner's assertions, the decision below carries no practical consequences on Puerto Rican criminal justice justifying immediate review. A reversal by this Court will almost certainly result in the Puerto Rico Supreme Court reaching the identical result based on the Puerto Rico Constitution, leaving

the parties right back where they started. Yet, a decision by this Court could have complex and unpredictable effects both on political debate and on other litigation related to Puerto Rico's political status; indeed, a reversal of the judgment below might render the Puerto Rican taxation system unconstitutional. As a matter of prudence, the Court should stay its hand.

Finally, the decision below is correct. This Court has already held that because Puerto Rico is a "territory" of the United States, it is not a separate sovereign for double jeopardy purposes. *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937). Nothing material has changed. Congress's decision to delegate additional powers to Puerto Rico in the 1950s, while preserving Puerto Rico's constitutional status as a "territory," could not and did not overrule *Shell*. Because Petitioner has offered no persuasive basis for the Court to reconsider its precedent, the Petition should be denied.

STATEMENT OF THE CASE

A. Background

Previously a colony of Spain, Puerto Rico became a territory of the United States pursuant to the Treaty of Paris, which was formally ratified in 1899 after America won the Spanish-American War. The Treaty of Paris stated that Congress would determine "the civil rights and political status" of Puerto Ricans. Treaty of Paris, 30 Stat. 1754, art. IX (1899). Exercising its constitutional power to "make all needful Rules and Regulations respecting the Territor[ies]," U.S. Const.

art. IV, § 3, cl. 2, Congress has repeatedly delegated power to local Puerto Rican authorities—while reserving for itself ultimate authority over the structure of the Puerto Rican government.

Congress's first delegation of power to Puerto Rico was the Foraker Act in 1900, which established a government for Puerto Rico and allowed Puerto Ricans to popularly elect their own House of Delegates. *See* Organic Act of 1900, ch. 191, 31 Stat. 77. Over time, Congress granted Puerto Rico additional autonomy. In 1917, Congress passed the Jones Act, which created a popularly elected Puerto Rican Senate. *See* Organic Act of 1917, Pub. L. No. 64-368, ch. 145, 39 Stat. 951. In 1947, Congress enacted legislation permitting Puerto Ricans to popularly elect their own governor, who would appoint the heads of almost every executive department in Puerto Rico. *See* Act of Aug. 5, 1947, ch. 490, 61 Stat. 770. Accordingly, by 1948, Puerto Ricans were directly electing their own governor and both houses of their legislature.

In 1950, Congress enacted legislation authorizing the Puerto Rican people to establish a new territorial constitution, but retaining for itself the plenary authority to review the territorial constitution before it became effective. Act of July 3, 1950, Pub. L. No. 81-600, § 3, 64 Stat. 319. Although this legislation, known as Public Law 600, delegated additional powers to the Puerto Rican people, neither Congress, nor the executive, nor Puerto Rico itself intended it to work a change in the territorial status of Puerto Rico. The House and Senate Committee Reports both stated that

the law "would not change Puerto Rico's fundamental political, social and economic relationship to the United States." H.R. Rep. No. 81-2275 at 3 (1950); S. Rep. No. 81-1779 at 3 (1950). They also made clear that the law in no way "preclude[s] a future determination by the Congress of Puerto Rico's ultimate political status." H.R. Rep. No. 81-2275 at 3; *see also* S. Rep. No. 81-1779 at 4.

In the words of the United States Secretary of the Interior, who was the cabinet officer responsible for the administration of Puerto Rico, the "bill merely authorizes the people of Puerto Rico to adopt their own constitution and to organize a local government" and would "not change Puerto Rico's political, social, and economic relationship to the United States." *Puerto Rico Constitution: Hearings on HR 7674 and S. 3336 Before the House Comm. on Public Lands*, 81st Cong., 163, 164 (1949-1950) (letter from Secretary of the Interior Oscar. L. Chapman to Chairman Joseph C. O'Mahoney).

The Resident Commissioner of Puerto Rico, whom the people of Puerto Rico directly elected as their non-voting delegate to Congress, testified likewise: "H.R. 7674 would not change the status of the island of Puerto Rico relative to the United States. ... *It would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris.*" *Id.* at 63 (statement of Antonio Fernós Isern) (emphasis added). The popularly elected governor of Puerto Rico, Luis Muñoz Marín, confirmed that "Congress can always get around and legislate again" if

Puerto Rico did not fare well under its own constitution. *Id.* at 33.

In accordance with Public Law 600, Puerto Rico called a convention to draft its preliminary constitution, which was ultimately approved by Puerto Rican voters in March 1952. *See* H.R. Rep. 82-1832 (1952). However, the territorial constitution would take effect only "[u]pon approval by the Congress" and by the President. Act of July 3, 1950, Pub. L. No. 81-600, § 3, 64 Stat. 319.

President Truman confirmed that the territorial constitution created a republican form of government and urged Congress to approve it. *See* H.R. Rep. 82-1832 at 8-10. When presented with the preliminary constitution, Congress unilaterally made three important changes: (1) Congress removed Section 20 of Article II, which had established a right to work, right to adequate standard of living, and social protection in old age or sickness; (2) Congress added a provision assuring continuation of private elementary schools; and (3) Congress added a provision requiring that any amendment be consistent with the federal Constitution, the Puerto Rican Federal Relations Act, and Public Law 600. *See* Joint Resolution, Pub. L. No. 82-447, 66 Stat. 327 (1952).

Congress then approved the modified territorial constitution—and again made clear that "*the approval of this constitution by the Congress will not change Puerto Rico's fundamental political, social, and economic relationship to the United States.*" H.R. Rep.

82-1832 at 7 (emphasis added); *see also* S. Rep. No. 82-1720 at 6-7 (1952). President Truman signed the Congressionally-modified constitution on July 3, 1952, and then Puerto Rico's constitutional convention approved the constitution on July 25, 1952. *See* José Trías Monge, *Puerto Rico: The Trials of the Oldest Colony in the World* 117-18 (1997).

B. Proceedings Below

Respondent Luis Sánchez Valle was indicted in Puerto Rico territorial court for (1) selling a firearm and ammunition without a permit, *see* 25 P.R. Laws Ann. § 458; and (2) illegally carrying a firearm, *see id.* § 458c. Pet. App. 2a. Based on the same facts, a federal grand jury indicted Sánchez Valle for the illegal trafficking of firearms and ammunition in interstate commerce, in violation of 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D), 924(a)(2). Pet. App. 2a.

Sánchez Valle pleaded guilty in federal court and was sentenced to prison, followed by house arrest and supervised release. Pet App. 2a-3a. Upon Sánchez Valle's motion, the Puerto Rico territorial court dismissed all of his pending indictments, finding that the Double Jeopardy Clause forbade prosecution of the alleged violations of Puerto Rico territorial law after Sánchez Valle had been convicted in federal court. Pet. App. 3a.

Respondent Jaime Gómez Vázquez was indicted in Puerto Rico territorial court for (1) selling a firearm without a permit, *see* 25 P.R. Laws Ann. § 458; (2) illegally carrying a rifle, *see id.* § 458f; and (3)

transferring a mutilated weapon, *see id.* § 458i. Pet. App. 4a. Based on the same facts, a federal grand jury indicted Gómez Vázquez for the illegal trafficking of firearms in interstate commerce, in violation of 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D). Pet. App. 4a.

Gómez Vázquez pleaded guilty in federal court and was sentenced to prison followed by supervised release. Pet. App. 5a. Upon Gómez Vázquez's motion, the Puerto Rico territorial court then dismissed all charges against him on double jeopardy grounds. Pet. App. 6a.

The prosecution filed appeals in both cases, which were consolidated at the Puerto Rico Court of Appeals. That court reversed and concluded that under binding Puerto Rico Supreme Court precedent, Puerto Rico and the United States were separate sovereigns, and thus there was no double jeopardy bar for any of Respondents' charges in territorial court. Pet. App. 6a; Pet. App. 281a.

As relevant here, the Puerto Rico Supreme Court reversed. Pet. App. 1a-69a. The court found that for each Respondent, the territorial charge of illegal sale of weapons and ammunition under 25 P.R. Laws Ann. § 458 was the same crime, for double jeopardy purposes, as the federal charge of trafficking firearms and ammunition in interstate commerce under 18 U.S.C. § 922(a)(1)(A), of which both respondents were convicted in federal court. The court then held that because Puerto Rico and the United States are the same sovereign, trying Respondents in territorial court

for the § 458 charges would violate the Double Jeopardy Clause. Thus, it reversed the Puerto Rico Court of Appeals insofar as it had authorized prosecution on those charges. Pet. App. 2a.[1]

The court carefully analyzed the "dual sovereignty" principle, which states that the double jeopardy clause of the Fifth Amendment does not prevent two separate sovereigns from prosecuting an individual for the same offense. Pet. App. 14a. To determine whether two government entities are the same sovereign, the court looked to the "ultimate source of the power under which the indictments were undertaken." Pet. App. 19a. Pursuant to this analysis, the U.S. Supreme Court has held that the federal government, states, and Indian tribes all constitute separate sovereigns. Pet. App. 15a-23a.

The court noted, however, that the federal government and its territories are *not* considered separate sovereigns, because "a territorial court and a federal court exercise the authority of the same sovereign: the United States." Pet. App. 23a. In support, the court cited *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937), where this Court held that Puerto Rico and the United States were the same sovereign for purposes of double jeopardy because Puerto Rico

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[1] The Puerto Rico Supreme Court affirmed the Court of Appeals' decision authorizing prosecution on the remaining charges against each Respondent, on the ground that those charges were different from the crimes charged in federal court, and thus posed no double jeopardy issue. Pet. App. 10a.

was constitutionally a territory, albeit one with a high level of autonomy and a state-like status. Pet. App. 25a.

The court held that *Shell* was still good law, even though Congress had allowed Puerto Rico to enact its own constitution in 1952. Pet. App. 41a-62a. The court canvassed the contemporary legislative history, which showed uniformity among the legislative and executive branches, as well as Puerto Rican officials themselves, for the proposition that the enactment of the Puerto Rican constitution did not change Puerto Rico's sovereign status. Pet. App. 41a-46a. The court also held that post-1952 decisions of the U.S. Supreme Court confirmed that the Puerto Rico constitution "did not represent a change in the fundamental basis of the constitutional relations between Puerto Rico and the United States." Pet. App. 46a-56a.

The court noted that there are cases where Puerto Rico has been treated *like* a state, Pet. App. 63a, but those cases were not relevant because "the analysis that must be performed to determine whether there are two different sovereigns under the constitutional double jeopardy clause is not whether the entity is similar to, acts like or has certain attributes of a true sovereign." Pet. App. 64a. Rather, the "fundamental question ... is whether the two entities derive their authority from the same ultimate source of power." *Id.* Given that "Puerto Rico's authority to prosecute individuals is derived from its delegation by [the] United States Congress and not by virtue of its own sovereignty," the court concluded that double jeopardy

barred Puerto Rico's attempts to prosecute Respondents for the same crimes to which they had been tried in federal court. Pet. App. 65a-69a.

Chief Justice Fiol Matta, joined by Justice Oronoz Rodríguez, concurred in the result. The concurrence would have held that the prosecutions were barred by the Puerto Rico constitution's prohibition of double jeopardy—rather than the federal Constitution's. Pet. App. 71a-72a. The concurrence concluded that for purposes of the federal Double Jeopardy Clause, Puerto Rico and the United States were separate sovereigns. Pet. App. 164a. However, the concurrence reasoned that the Puerto Rico constitution, which states that "the dignity of the human being is inviolable," focuses its double jeopardy analysis primarily on the *individual defendant*'s right against duplicative proceedings, as opposed to the federal constitution, which focuses primarily on the *sovereign's* right to prosecute. Pet. App. 180a (quotation marks omitted). Thus, the concurrence concluded that Puerto Rico's constitution forbids successive prosecutions, even when conducted by separate sovereigns. Pet. App. 190a.

Justice Rodríguez Rodríguez dissented and argued that the majority was exercising "political pressure to pursue their political ideologies," rather than following the law, which she felt required affirmance. Pet. App. 241a. The dissent contended that Puerto Rico and the United States are separate sovereigns because "Congress, in approving [the Puerto Rico] Constitution, *relinquished* its plenary powers regarding Puerto Rico

in what pertains to internal affairs." Pet. App. 230a (emphasis in original). Given the extensive authority delegated to Puerto Rico to manage its own legislative and executive branches, "it is indisputable that the Commonwealth, within the scope of its internal affairs, is a sovereign entity that must be considered as such for purposes of the dual sovereignty doctrine." Pet. App. 240a. The dissent did not separately address the issue under the Puerto Rico constitution.

REASONS TO DENY THE PETITION

I. This Case Does Not Warrant Review.

Petitioner's argument for certiorari is premised on an alleged conflict with *United States v. Lopez Andino*, 831 F.2d 1164 (1st Cir. 1987). But recent authority from the First Circuit casts serious doubt on the continuing viability of *Lopez Andino*, and the Court should defer review until the First Circuit has the opportunity to harmonize its discordant precedents. Moreover, even if a conflict exists, its practical effect is minimal and supplies no basis to inject this Court into the swirling political debates over Puerto Rico's constitutional status.

A. The Alleged Conflict With *Lopez Andino* Does Not Justify Review Because *Lopez Andino* May No Longer Be Good Law.

Petitioner purports to have identified "a circuit conflict about as stark as they come." Pet. 15. But that alleged conflict emerges from a muddled, perfunctory

analysis in a decades-old First Circuit case that may no longer be good law.

In *United States v. Lopez Andino*, 831 F.2d 1164 (1st Cir. 1987), a divided First Circuit panel held that the Double Jeopardy Clause permitted a defendant to be subject to successive prosecutions in Puerto Rico and federal court. *Id.* at 1168. In reaching this conclusion, the court quoted stray dicta from this Court's decisions in *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976) and *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982), which observed that Puerto Rico was "autonomous" in contexts entirely unrelated to the Double Jeopardy Clause. It also cited its own prior decision in *United States v. Benmuhar*, 658 F.2d 14, 18 (1st Cir. 1981), which asserted without analysis that Puerto Rico was a "state" for double jeopardy purposes. Without further explanation, the *Lopez Andino* court concluded that Puerto Rico "is treated as a state" for purposes of the Double Jeopardy Clause. 831 F.2d at 1168.

Judge Torruella wrote separately to express his disagreement with the court's double jeopardy analysis, based on an exhaustive analysis of Puerto Rico's constitutional status that the majority ignored. *Id.* at 1172-77 (Torruella, J., concurring). As Judge Torruella pointed out, not only was the majority's analysis perfunctory, but it was also unnecessary: the offenses charged in Puerto Rico and federal court were distinct, making the Double Jeopardy Clause irrelevant. *Id.*

Subsequent developments in the First Circuit cast doubt on *Lopez Andino*'s continuing viability. First, in two seminal cases from the 2000s, the First Circuit rejected the argument that Puerto Rico should be treated the same as the several States. In *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 152 (1st Cir. 2005) (en banc), the court held that Puerto Rican residents lacked the constitutional right to vote for President. Subsequently, in *Igartúa v. United States*, 626 F.3d 592, 594 (1st Cir. 2010), the court held that Puerto Rican residents could not vote for members of the House of Representatives. Although not formally inconsistent with *Lopez Andino*, these cases are difficult to reconcile with *Lopez Andino*'s reasoning that Puerto Rico "is treated as a state" for constitutional purposes. 831 F.2d at 1168.

Most recently, in *Franklin California Tax-Free Trust v. Puerto Rico*, No. 15-1218, ___ F.3d ___, 2015 WL 4079422 (1st Cir. July 6, 2015), the First Circuit appears to have created an intra-circuit conflict on Puerto Rico's sovereign status, making it unclear at best whether *Lopez Andino* remains good law.

Franklin addressed municipal bankruptcy law in Puerto Rico. As recounted by the First Circuit, federal bankruptcy law did not apply to municipal bankruptcies "for much of the nation's history," based on a concern that "[f]ederal intervention . . . might interfere with states' rights under the Tenth Amendment in controlling their own municipalities." *Id.* at *3. This Court struck down the first federal municipality bankruptcy statute on precisely this ground: "[T]he

view that the federal government, acting under the bankruptcy clause, may impose its will and impair state powers" is "*inconsistent with the idea of sovereignty.*" *Ashton v. Cameron Cnty. Water Improvement Dist. No. 1*, 298 U.S. 513, 531 (1936) (emphasis added). Subsequently, Congress enacted new legislation which permitted municipalities to declare bankruptcy only if specifically authorized under State law. *Franklin*, 2015 WL 4079422, at *3. The Supreme Court upheld the new legislation, holding that "[t]he statute is carefully drawn so as not to impinge upon the sovereignty of the State." *United States v. Bekins*, 304 U.S. 27, 51 (1938).

However, although Congress now allows States to authorize its municipalities to declare bankruptcy, it has expressly denied Puerto Rico the same privilege. *Franklin*, 2015 WL 4079422, at *1 (citing 11 U.S.C. §§ 101(52), 109(c)). Nonetheless, in 2014, Puerto Rico enacted a municipal bankruptcy law in an effort to address its current fiscal crisis. *Id.* The law was designed to allow Puerto Rican public utilities, which are "municipalities" under federal bankruptcy law, to restructure their debt. *Id.*

In *Franklin*, the First Circuit held that because federal bankruptcy law permits the states, but not Puerto Rico, to authorize municipal bankruptcies, Puerto Rico's municipal bankruptcy law was preempted. *Id.* The court rejected Puerto Rico's argument that preemption "constitute[s] an impermissible interference with a state's control over its municipalities," holding that *Ashton* did not apply to Puerto Rico because "Puerto Rico's powers are not

[those] reserved to the States but those specifically granted to it by Congress under its constitution." *Id.* at *14 (bracket in original) (quotation marks omitted).

Given *Ashton's* holding that an equivalent federal statute, as applied to the States, is "inconsistent with the idea of sovereignty," 209 U.S. at 531, the First Circuit decision upholding the statute as applied to Puerto Rico establishes that Puerto Rico is *not* a separate sovereign. This decision appears irreconcilable with *Lopez Andino*'s holding that Puerto Rico *is* a separate sovereign. And the First Circuit did not even try to reconcile the two cases. Instead, the court expressly relied on *Judge Torruella's* opinion from *Lopez Andino*, which argued that Puerto Rico is *not* a separate sovereign. *Franklin*, 2015 WL 4079422, at *14 (quoting *Lopez Andino*, 831 F.2d at 1172 (Torruella, J., concurring)). Thus, *Franklin* appears to have created an intra-circuit conflict on Puerto Rico's sovereign status.

Petitioner did not file a petition for rehearing en banc in *Franklin*, presumably so as not to jeopardize the circuit split it cites in this petition. In a future case, however, a criminal defendant facing successive prosecutions in Puerto Rico and federal court will have every incentive to litigate the double jeopardy issue fully, including filing a petition for rehearing en banc in the First Circuit.

There are strong reasons to believe that the en banc First Circuit would reconsider *Lopez Andino*. First, as noted above, the First Circuit's own modern

precedents are in serious tension with *Lopez Andino*. Second, since *Lopez Andino* was decided, two courts—the court below, and the Eleventh Circuit—have analyzed the issue in far more detail than in *Lopez Andino* and have concluded that Puerto Rico is not a separate sovereign for double jeopardy purposes. *See* Pet. App. 1a-69a (decision below); *United States v. Sánchez*, 992 F.2d 1143, 1153 (11th Cir. 1993) (holding that that "[d]espite passage of the Federal Relations Act and the Puerto Rican Constitution," "Puerto Rican courts continue to derive their authority to punish from the United States Congress"). This intervening authority creates a strong prospect that the First Circuit will reconsider and formally overrule *Lopez Andino*.

Moreover, the First Circuit will have an opportunity to weigh in on the continuing viability of *Lopez Andino* very soon. In *United States v. Mercado-Flores*, No. 14-cr-466, ___ F. Supp. 3d ___, 2015 WL 3764518 (D.P.R. June 4, 2015), the District Court held that 18 U.S.C. § 2421, which makes it a federal crime to transport any individual with the intent to engage in criminal sexual activity "in interstate or foreign commerce, or in any Territory or Possession of the United States," does not apply to a purely intrastate criminal act in Puerto Rico. 2015 WL 3764518 at *1 (quotation marks omitted). The District Court's decision expressly relied on *Lopez Andino*. *Id.* at *5. The court "acknowledged" the contrary views of Judge Torruella and of other courts, including the court below. *Id.* at *8 n.8. But it found that it "must adhere to ... First Circuit precedent." *Id.* at *8. The United

States has appealed the District Court's ruling, *see United States v. Mercado-Flores*, No. 15-1859 (1st Cir.), and the First Circuit will therefore soon clarify whether and to what extent *Lopez Andino* remains binding precedent.

The First Circuit should be afforded the opportunity to reconcile *Franklin* and *Lopez Andino*, and consider whether to adopt the reasoning in *Sánchez* and the case below. At this time, given the instability in the First Circuit's precedents, there is no conflict of authority warranting this Court's review.

B. A Grant Of Certiorari In This Case Would Have Limited Practical Significance To Puerto Rican Criminal Justice.

Petitioner argues that this Court's immediate review is necessary because of the alleged practical effects of the decision below on Puerto Rican criminal justice. Pet. 29-31. Petitioner's arguments are exaggerated and provide no basis for review.

First, if this Court were to reverse the decision below as Petitioner requests, the Court's decision would be unlikely to have any real-world impact on the ability of Puerto Rican authorities to bring criminal prosecutions. The case would be remanded to the Supreme Court of Puerto Rico, and on remand, that court would likely grant respondents the same relief under the Puerto Rico Constitution as this Court denied them under the Federal Constitution. In a concurring opinion below, two justices of the Puerto Rico Supreme Court rejected the majority's analysis of

the dual sovereignty exception under the Federal Constitution, but explained that the Puerto Rico Constitution, which is "broader" in scope, prohibits successive prosecutions in federal and Puerto Rico court. *See* P.R. Const. art. II, § 11; Pet. App. at 73a, 188-190a. The justices in the majority did not address that question, but given their vigorous vindication of respondents' right to protection against double jeopardy under the Federal Constitution, they would be hard pressed to deny respondents an equivalent protection under the broader provisions of the Puerto Rico Constitution. Thus, reversing the decision below would likely result in an effectively identical outcome to the current status quo: defendants could be subject to successive prosecutions if the first case were brought in a territorial court and the second in federal court, but not if the cases were brought in reverse order.

Even setting that prospect aside, Petitioner seriously overstates the practical significance of the decision as it stands. Petitioner maintains that it "leads to the anomalous and untenable result that an individual first prosecuted in federal court in Puerto Rico and then prosecuted in territorial court for the same offense can raise a successful federal double jeopardy objection, while a person first prosecuted in court in Puerto Rico cannot." Pet. 3; *see id.* at 30. But this result is neither anomalous nor untenable.

First, the result is hardly "anomalous," given that a substantially identical result obtains in many jurisdictions across the United States. For example, in New York, "not only is the 'dual sovereignties' doctrine

ignored, but double jeopardy protection is extended, generally, to offenses arising out of a common event." *People v. Abbamonte*, 371 N.E.2d 485, 488 (N.Y. 1977) (discussing CPL 40.20 (subd. 2)); *see also State v. Hogg*, 385 A.2d 844, 845-47 (N.H. 1978) (dual sovereignty exception does not apply in New Hampshire state court); *State v. LeCoure*, 491 P.2d 1228, 1230-31 (Mont. 1971) (same, in Montana); *Commonwealth v. Grazier*, 393 A.2d 335, 339 (Pa. 1978) (same, in Pennsylvania, as long as "the interests of the Commonwealth are sufficiently protected at the federal trial").

Nor is the result in this case "untenable." Petitioner's assertion that Puerto Rico has been "stripped . . . of control over its own criminal laws," Pet. 29, is a serious exaggeration. Few would say that New York, New Hampshire, Montana, and Pennsylvania lack "control over [their] own criminal laws" merely because of the absence of a dual-sovereignty exception to the double jeopardy clause in state court. *Id.* Nor has Petitioner pointed to any real-world practical problems that have arisen in any of those states as a result of the prohibition on successive prosecutions in state court.

In practice, if the U.S. Justice Department seeks to bring federal charges against a defendant based on conduct also barred by Puerto Rican law, Puerto Rican authorities can arrange with the Justice Department to bring its prosecution first, thereby avoiding the double jeopardy prohibition recognized in this case. And if the Justice Department insists on bringing its prosecution first, Puerto Rican authorities remain free to charge

the defendant with any offenses requiring proof of different elements under *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Indeed, the Puerto Rico Supreme Court expressly reinstated multiple charges against both Respondents for such offenses. *See* Pet. App. 10a. The minor impact this case will have on the Puerto Rican justice system does not justify plenary review.

C. The Court Should Not Enter The Controversial Debate Over Puerto Rico's Status.

It is clear from the very first sentence of its petition that Petitioner views this case not as a dispute over the administration of criminal justice, but as a springboard to have this Court resolve the controversial political debate over the status of Puerto Rico. *See* Pet. 1 (describing this as "the most important case on the constitutional relationship between Puerto Rico and the United States since the establishment of the Commonwealth in 1952"). Although Petitioner is wrong that a decision by this Court will affect Puerto Rican criminal justice, it is right that a decision by this Court could be "important," in the sense of having significant effects both on Puerto Rican political discourse and on other Puerto Rican status litigation. That is perhaps the strongest reason to *deny* certiorari in this case. This Court has previously refused to intervene in Puerto Rican status litigation, as shown by its denial of certiorari in three petitions arising from the far more consequential *Igartúa* cases. *See Igartúa v. United States*, 132 S. Ct. 2376 (2012); *Puerto Rico v.*

United States, 132 S. Ct. 2375 (2012); *Igartúa de la Rosa v. United States*, 547 U.S. 1035 (2006). This Court should maintain that practice and stay its hand here, in light of the complex and unpredictable consequences of declaring, as Petitioner suggests, that Puerto Rico is a "sovereign."

As a recent Presidential Task Force on Puerto Rico concluded, "Puerto Rico's status has been discussed and debated as far back as the Treaty of Paris," and the issue "has dominated the politics and life of the Island for decades." Report by the President's Task Force on Puerto Rico's Status 19, 24 (2011), *available at* https://www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf ("President's Task Force on Puerto Rico"). Congress perennially introduces legislation on whether—and under what terms—Puerto Rico should become a state or independent nation, or remain a territory. *See, e.g.*, Puerto Rico Status Resolution Act, H.R. 2000, 113th Cong. (2013); Puerto Rico Democracy Act of 2010, H.R. 2499, 111th Cong. (2010); Puerto Rico Democracy Act of 2007, H.R. 900, 110th Cong. (2007). Moreover, since 1967, Puerto Ricans have engaged in three significant plebiscites designed to determine their own will, but those votes have only "demonstrated significant divisions within the Puerto Rican electorate," with the meaning of the results themselves often hotly debated. President's Task Force on Puerto Rico at 21. The topic permeates all aspects of life and politics in Puerto Rico.

A declaration by this Court that Puerto Rico is, or is not, a "sovereign," could have a profound and

destabilizing effect on the debate over Puerto Rico's status. Indeed, even the dissent in this very case accused the majority of issuing a politically motivated opinion designed to galvanize support on the status question. *See* Pet. App. 241a (Rodríguez Rodríguez, J., dissenting). And with surprising candor, the Petition emphasizes the "political implications" of the decision below as a basis for granting review. Pet. 1. In fact it is a basis for denial. Absent a cert-worthy legal question, the Court should not lend its voice to this fundamentally political debate.

Moreover, the Court's decision—depending on its reasoning—could have dramatic effects on other Puerto Rican status litigation. Most obviously, the Court's decision could affect the more consequential issue decided in *Franklin*: whether Congress may preempt Puerto Rico's effort to allow its public utilities to declare bankruptcy. Indeed, Petitioner may file a Petition for Certiorari shortly in *Franklin*, and if it does, it will doubtless ask the Court to hold *Franklin* pending resolution of this case. Thus, this case may well be a Trojan Horse for Petitioner to obtain review of the question in *Franklin*.

Even more consequentially, a decision by this Court finding Puerto Rico to be a "sovereign" might also render the Puerto Rican taxation regime unconstitutional. Puerto Ricans are exempted from most federal tax laws. *See* 48 U.S.C. § 734 (providing that, with certain exceptions, "the internal revenue laws" do not apply to Puerto Rico). Yet, the Tax Uniformity Clause requires that "all Duties, Imposts,

and Excises" imposed by Congress "shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. The constitutional basis for Puerto Rico's distinct tax regime is *Downes v. Bidwell*, 182 U.S. 244 (1901), which held that the Tax Uniformity Clause does not apply to Puerto Rico. The Court justified this conclusion based on Congress's plenary power over Puerto Rico—the precise reasoning that led the Court to hold in *Shell* that the dual-sovereignty exception did not apply to Puerto Rico. *Downes*, 182 U.S. at 289-90 (White, J., concurring)[2] (noting that the "Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States"). If, as Petitioner contends, *Shell* is no longer good law, then *Downes* might no longer be good law either, which would mean that the entire Puerto Rican taxation system would be upended. And if a court held that Congress suddenly had the constitutional obligation to impose federal tax obligations on Puerto Ricans, Congress would face tremendous pressure to extend more federal funds to Puerto Rico and to give Puerto Ricans the right to representation in Congress and the Electoral College.

Other significant consequences may follow from a reversal by this Court. For instance, it might lead the First Circuit to reconsider its prior, closely-divided decisions in the *Igartúa* cases concluding that Puerto

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[2] Justice White's concurrence has long been recognized as "the settled law of the court." *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922).

Ricans may not vote for President or for members of Congress. And it could result in the Puerto Rican government gaining new "sovereign" rights against the United States, *see, e.g.*, *New York v. United States*, 505 U.S. 144, 188 (1992) (holding the "residuary and inviolable sovereignty" of the States prohibited Congress from "compel[ling] the States to enact or administer a federal regulatory program"), jeopardizing the century-old legal regime that Congress has plenary power to regulate in Puerto Rico.

In the context of a relatively obscure criminal case, the Court should stay out of this hornet's nest. *See Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis.").

D. The Decision Of The Puerto Rico Supreme Court Is Correct.

Review is unwarranted here for the additional reason that the decision below is plainly correct. Although the normative question of whether Puerto Rico *should* be a sovereign entity is difficult, the descriptive question of whether Puerto Rico currently *is* a sovereign entity is not. Puerto Rico is a Territory of the United States. Under the Constitution, States are sovereign, but Territories are not. For this straightforward reason, this Court held in 1937 that

Puerto Rico was not a separate sovereign from the United States for purposes of double jeopardy because they "exert all their powers under and by authority of the same government." *Shell*, 302 U.S. at 265. That decision was correct at the time and is still correct today.

1. Puerto Rico Is Not "Sovereign" Because There Is No Such Thing As A "Sovereign Territory."

Petitioner argues that Puerto Rico is a 'sovereign territory,' something less than a state but more than a territory. *See* Pet. 27. Such an entity has never existed in our Nation's history and is inimical to the structure of the Constitution.

The Constitution recognizes two—and only two—forms of subnational government: states and territories. *See* U.S. Const. art. IV, § 3, cl. 1 (states); *id.* cl. 2 (territories); *accord First Nat'l Bank v. Cnty. of Yankton*, 101 U.S. 129, 133 (1879) ("All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress.").

States and territories have vastly different statuses under the Constitution. Congress possesses enumerated powers over states. *See United States v. Lopez*, 514 U.S. 549, 552 (1995) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite") (quoting The Federalist No. 45, at 292-93

(James Madison) (C. Rossiter ed. 1961)). Moreover, even in the exercise of those powers, Congress may not interfere with state sovereignty. *See, e.g., Printz v. United States*, 521 U.S. 898, 918-19 (1997) (holding that states "retained 'a residuary and inviolable sovereignty'" under the Constitution (quoting The Federalist No. 39, at 245 (James Madison)). This is because the government of a state "does not derive its powers from the United States," *Grafton v. United States*, 206 U.S. 333, 354-55 (1907), but instead derives its force "from power originally belonging to the states, preserved to them by the Tenth Amendment," *United States v. Lanza*, 260 U.S. 377, 381-82 (1922).

Conversely, Congress has plenary authority over territories and their governments. *See* U.S. Const. art IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States ...."). As the Court held in *Downes v. Bidwell*, 182 U.S. 244 (1901), the "Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States," and inherent in that grant is Congress's power "to deprive such territory of representative government if it considered just to do so, and to change such local governments at discretion." *Id.* at 289-90 (White, J., concurring).

Because Congress has plenary power over territories, a "territorial government is entirely the creation of Congress, 'and its judicial tribunals exert all their powers by authority of the United States.'"

United States v. Wheeler, 435 U.S. 313, 321 (1978) (quoting *Grafton*, 206 U.S. at 354). "Territory and Nation ... are not two separate sovereigns ... but one alone." *Id.* Accordingly, when "a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as an agency of the federal government." *Id.* (quotation marks omitted).

These principles resolve this case. As Petitioner itself acknowledges, Pet. 27, and as this Court has squarely held, *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (per curiam), Puerto Rico is a "territory" under the Constitution. Therefore, "a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court, since both are arms of the same sovereign." *Waller v. Florida*, 397 U.S. 387, 393 (1970).

Resisting this argument, Petitioner attempts to analogize Puerto Rico to Indian tribes, which have been held to possess their own sovereignty for double jeopardy purposes. *See Wheeler*, 435 U.S. at 319. But this Court has made clear that this is because tribes have a sovereignty that pre-dates the Constitution and Congress itself. *Id.* at 322-23. Puerto Rico is not, and has never been, considered an Indian tribe; nor can it claim any right to sovereignty predating the Constitution, given that the island was formally acquired from Spain in 1899.

Indeed, this Court has already resolved the question presented here. In *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937), this Court held Puerto Rico and the United States were the same sovereign for purposes of double jeopardy because Puerto Rico was constitutionally a territory, albeit one with a high level of autonomy and a state-like status: "Both the territorial and federal laws and the courts ... are creations emanating from the same sovereignty. Prosecution under one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court.'" *Id.* at 264. The Court recognized that Puerto Rico possessed "many of the attributes of quasi sovereignty possessed by the states," but nonetheless held that this did not establish *actual* sovereignty for double jeopardy purposes. *Id.* at 261-64. This decision continues to apply today.

2. Congress's 1950-52 Legislation Did Not Transform Puerto Rico Into A Sovereign.

Petitioner does not argue that *Shell* was wrongly decided. Instead, Petitioner contends that when Congress delegated certain powers to Puerto Rico in the early 1950s, it created a heretofore unknown category of 'sovereign territory' and thus overruled *Shell*. Pet. 21-29. It did not.

First and foremost, Congress's legislation neither altered Puerto Rico's status as a constitutional "Territory," nor reduced Congress's plenary power over Puerto Rico. *Harris*, 446 U.S. at 651-52. Indeed, the statute authorizing its territorial constitution was

an ordinary act of Congress, which can be repealed at any time. With Congress possessing the right to revoke and modify all aspects of Puerto Rico's government—including the territorial constitution itself, which Puerto Rico claims to be the source of its sovereignty, *see* Pet. 22—Puerto Rico lacks even the most basic attributes of a sovereign.

Contrary to Petitioner's contention, no case from this Court holds that Congress's 1950-52 legislation altered Puerto Rico's constitutional status. Petitioner cites cases—decided before *Harris*—holding that Puerto Rico is a "state" for purposes of federal statutes that include the word "state" without expressly mentioning Puerto Rico. Pet. 25-26. But those statutory interpretation decisions are a far cry from a decision overruling *Shell*, and in any event, other case law holds that Puerto Rico is *not* a state for purposes of other statutes, based on the particular statutory context at issue. *See Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970).

Petitioner points to the fact that Congress approved Puerto Rico's territorial constitution, which states that it was issued by "[w]e, the people of Puerto Rico." Pet. 22-27. Apparently Petitioner aims to suggest that Puerto Rico possesses the same sovereignty as the United States, whose Constitution's preamble likewise proclaims that it is issued by "[w]e the people." U.S. Const. pmbl. However, the American people's famous statement would have had considerably less resonance if Great Britain retained plenary power to enact legislation over the United States, abolish the

American government, and revoke the federal Constitution itself. That is the power that Congress has over Puerto Rico.

Indeed, Petitioner's argument would apply with identical force to the Commonwealth of the Northern Mariana Islands ("CNMI"). The federal government has formally approved the CNMI territorial constitution, which was likewise issued by "[w]e the people" of the CNMI, and establishes a full territorial government to handle all local affairs. N. Mar. I. Const. pmbl., arts. II-IV, *available at* http://www.cnmilaw.org/constitution.html; Proclamation No. 4534, 42 Fed. Reg. 56,593 (Oct. 24, 1977) (approving CNMI constitution); S. Rep. No. 94-596 at 2 (1976) ("[T]he Marianas constitution and government structure will be a product of a Marianas constitutional convention, *as was the case with Puerto Rico*, rather than through an organic act of the United States Congress." (emphasis added)). Even Petitioner, however, does not contend that the CNMI is a sovereign entity.

Finally, if there were any doubt, the legislative history of the 1950-52 legislation makes clear that Congress never intended to transform Puerto Rico into a new sovereign. Both before and after it approved the new Puerto Rican constitution, Congress stated that its legislation does "not change Puerto Rico's fundamental political, social and economic relationship to the United States." H.R. Rep. No. 81-2275 at 3 (before approval); S. Rep. No. 81-1779 at 3 (before approval); H.R. Rep. 82-1832 at 7 (after approval). Moreover, the Resident

Commissioner of Puerto Rico, the popularly elected Governor of Puerto Rico, and the United States Secretary of the Interior all stated the exact same: "H.R. 7674 would not change the status of the island of Puerto Rico relative to the United States. ... It would not alter the powers of sovereignty acquire by the United States over Puerto Rico under the terms of the Treaty of Paris." *Puerto Rico Constitution: Hearings on HR 7674 and S. 3336 Before the House Comm. on Public Lands*, 81st Cong. 63 (1949-1950) (statement of Antonio Fernós Isern); *id.* at 33 (statement of Governor Luis Muñoz Marín); *id.* at 163-64 (letter from Secretary of the Interior Oscar. L. Chapman to Chairman Joseph C. O'Mahoney). There is no historical basis for the proposition that Congress created a new sovereign.

In sum, the reasoning in *Shell* continues to govern this case. Just as in *Shell*, Puerto Rico may possess the "attributes of quasi sovereignty." 302 U.S. at 261-62. But it remains a constitutional territory, and thus cannot be "sovereign" for double jeopardy purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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